

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW SANTIAGO ROMERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46220

FILED

JUN 12 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ruben*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of burglary while in the possession of a firearm, one count of conspiracy to commit robbery, and one count of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge. The district court sentenced appellant Matthew Santiago Romero to serve a prison term of 26 to 120 months for burglary, a prison term of 12 to 48 months for conspiracy, and two consecutive prison terms of 26 to 120 months for robbery with the use of a deadly weapon. Romero presents six issues for our review.

First, Romero contends that the district court abused its discretion by denying his motion for a continuance. We disagree.

Romero's case first went to trial on August 15, 2005, a mistrial was declared on August 16, 2005, and a new trial began on August 17, 2005. At the start of the second trial, Romero requested a 60-day continuance. He claimed that (1) after talking with the jurors from the first trial, it was apparent that he needed an expert witness, (2) he wanted to retain private counsel, and (3) he wanted time to file a motion to dismiss based on the prosecutorial misconduct that resulted in the mistrial.

Romero did not seek an expert witness for the first trial, and he failed to inform the trial judge as to why an expert was needed for the second trial. Romero waited until the day of the trial to indicate that he wanted to substitute counsel,¹ and even then he failed to state why the substitution was necessary. Romero did not demonstrate that his motion to dismiss would have any reasonable possibility of success (see below). And Romero requested the continuance at the beginning of the trial, a time when the State's witnesses were present and ready to testify and the district court had prospective jurors lined-up for jury selection. Based on these circumstances, any prejudice that Romero sustained from the denial of his motion was minimal, whereas, the prejudice to district court and the administration of justice would have been significant had the continuance been granted.² Accordingly, we conclude that the district court did not abuse its discretion by denying Romero's motion for a continuance.³

Second, Romero contends that insufficient evidence was adduced at trial to connect him with the burglary, conspiracy, and

¹See Bland v. California Dep't of Corrections, 20 F.3d 1469, 1476 (9th Cir. 1994) ("It is within the trial court's discretion to deny a motion to substitute made on the eve of trial where substitution would require a continuance."), overruled on other grounds by Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000).

²Mulder v. State, 116 Nev. 1, 9, 992 P.2d 845, 850 (2000) (to determine whether the denial of a continuance was an abuse of discretion, we balance "the prejudice to the district court of a continuance against the prejudice to the defendant of no continuance").

³Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) ("The decision to grant or deny trial continuances is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion.").

robbery. He specifically asserts that there was no physical evidence linking him to the crimes, the identifications made by the two eyewitnesses were unreliable, and the photographic lineups had minimal evidentiary value. Our review of the record on appeal, however, reveals sufficient evidence to establish Romero's guilt beyond a reasonable doubt as determined by a rational trier of fact.⁴ In particular, we note that two eyewitnesses each testified that Romero was one of the robbers, identified Romero in court, and picked Romero out of a photographic lineup conducted during the police investigation.

We conclude that a rational juror could reasonably infer that Romero was one of the perpetrators of the 49er Saloon robbery from the evidence adduced at trial. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.⁵

Third, Romero contends that he was denied his right to a fair trial when the prosecutor engaged in misconduct during her closing argument. We disagree. The test for determining whether prosecutorial misconduct deprived a defendant of a fair trial is "whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."⁶

⁴See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

⁵See Bolden v. State, 97 Nev. 71, 624 P.20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

⁶Rudin v. State, 120 Nev. 121, 136-37, 86 P.3d 572, 582 (2004).

Here, Romero claims that the State misstated evidence about his height during the following statement:

Counsel is focusing in this case on one thing the defendant's height, because Golliday [one of the eyewitnesses] said he was five six. . . . And, it's interesting, because all the argument was is the defendant is five one, defendant is five one. The investigator came in and measured the defendant and he was five two and a half, that's what he said, he had on shoes. So, now, he's almost five three, so there's a smaller discrepancy.

Romero objected to this statement and the district court overruled Romero's objection, noting that the jury would determine what testimony was presented.⁷ We conclude that the district court cured any prosecutorial misstatement of this evidence and we perceive no error.⁸

Romero also claims that the prosecutor misstated evidence regarding his behavior after being arrested and that she improperly urged the jury to do the right thing. However, Romero failed to object to these alleged instances of misconduct and he has not demonstrated that the prosecutor's remarks were patently prejudicial.⁹ We conclude that Romero received a fair trial and was not denied due process.

⁷During the trial, Romero called one witness who measured him in front of the jury and stated that he was exactly five foot one with his shoes on.

⁸See Peoples v. State, 83 Nev. 115, 118-19, 423 P.2d 883, 885 (1967).

⁹Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (when appellant fails to object below, this court reviews alleged prosecutorial misconduct only if it constitutes plain error, *i.e.*, if it is shown to be patently prejudicial); *see also* Lisle v. State, 113 Nev. 540, 554, 937 P.2d 473, 482 (1997) (holding that the prosecutor's remarks to the jury

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Fourth, Romero contends that the district court abused its discretion by refusing to either give a cautionary instruction on the makeup of photographic lineups or admit expert testimony on how photographic lineups are compiled.

Romero's counsel informed the district court that she spoke to jurors who had been dismissed after the first trial and some of them indicated that they knew Romero had a record because the photograph used in the lineups was a "mug shot." Romero requested either a cautionary instruction stating that the photographs used in lineups are gathered from a variety of sources or expert testimony from his investigator to explain how the police department gathered the photos that were used to create the lineup. The district court overruled Romero's objection, stating that although it preferred not to give a cautionary instruction Romero could submit a proposed instruction at the end of the case for consideration.

Romero did not submit a proposed cautionary instruction, he did not provide a rationale for his failure to do so, and he did not show that a different result would have been obtained had a cautionary instruction been given.¹⁰ Romero also failed to demonstrate that his expert witness knew how the police gathered the photographs that used to create the lineups in this case or was otherwise able to provide specialized

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concerning accountability and doing the right thing do not constitute prosecutorial misconduct).

¹⁰See Batson v. State, 113 Nev. 669, 676-677, 941 P.2d 478, 483 (1997).

information helpful to the jury.¹¹ Accordingly, we conclude that the district court did not abuse its discretion by declining to give a cautionary instruction or allow expert testimony on photographic lineups.¹²

Fifth, Romero contends that the district court erred by denying his motion for dismissal of the charges. Citing Collier v. State,¹³ Romero claims that the State goaded him into seeking a mistrial and therefore the charges should have been dismissed on double jeopardy grounds. We disagree.

In Collier we observed that as a general rule "the double jeopardy clause does not bar retrial when a conviction is reversed on appeal," and we noted that an exception to this rule occurs when the defendant was granted a mistrial because of prosecutorial overreaching and the prosecutorial conduct in question was intended to goad the defendant into seeking the mistrial.¹⁴

Prior to Romero's first trial, the district court granted his motion in limine to exclude any evidence regarding SCOPE because it would indicate that Romero had a prior record. Later, during Romero's cross-examination, a State witness referred to SCOPE several times. On Romero's motion, the district court declared a mistrial. The district court

¹¹See NRS 50.275.

¹²Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000) ("Whether expert testimony will be admitted . . . is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion.").

¹³103 Nev. 563, 747 P.2d 225 (1987).

¹⁴Id. at 565, 747 P.2d at 226.

found that there was no prosecutorial misconduct and our review of the record reveals nothing that would suggest that Romero was goaded into seeking a mistrial. Accordingly, we conclude that the district court did not err in denying Romero's motion for dismissal.

Sixth, Romero contends that the district court erred by permitting the State to exclude a Hispanic venire member on discriminatory grounds. Romero claims that the State's reason for the venire member's exclusion was pretextual. We disagree.

In response to Romero's Batson¹⁵ objection, the State provided the following race-neutral explanation:

[T]he reason would be based upon the fact that number one, while he was being questioned he was having difficulty understanding and it seemed like he was having a language issue. Yes, he spoke English, to the point where the lady next to him, Miss Munoz, wanted to interpret for him.

I asked him a question whether or not he would follow the instructions as provided by the Judge and he said no. So that led me to believe that he was having problems with understanding actually some of the proceedings and that's the reason why the State actually excused him for a race neutral reason. Additionally, Miss Munoz is actually seated in the pool.

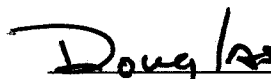
The district court found that the seated jury represented a good cross-section of the community, the excused venire member lacked a reasonable understanding of the English language, and the venire member's poor


¹⁵Batson v. Kentucky, 476 U.S. 79 (1986).

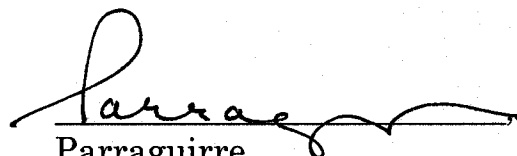
English comprehension was a race-neutral reason to excuse him.¹⁶ Based on our review of the transcripts and the district court's findings, we conclude that the district court did not err in overruling Romero's Batson objection. The trial court's decision on the question of discriminatory intent is a finding of fact to be accorded great deference on appeal.¹⁷

Having considered Romero's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

¹⁶See Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996) (the trial court must determine whether the proffered race-neutral explanation is merely a pretext for purposeful racial discrimination), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004).

¹⁷See Henandez v. New York, 500 U.S. 352, 364-65 (1991) (plurality opinion); Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk